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07                   UNITED STATES DISTRICT COURT  
08                   WESTERN DISTRICT OF WASHINGTON  
09                   AT SEATTLE

10                   UNITED STATES OF AMERICA,                 )  
11                   Plaintiff,                                      ) Case No. CR04-128 MJP  
12                   v.    )  
13                   CARL ALEXANDER HARRIS,                  ) REPORT AND RECOMMENDATION  
14                   Defendant.                                    ) OF U.S. MAGISTRATE JUDGE  
  ) AS TO ALLEGED VIOLATIONS  
  ) OF SUPERVISED RELEASE  
  )

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15                   An evidentiary hearing on a supervised release revocation in these cases was  
16                   scheduled before the undersigned Magistrate Judge on August 31, 2006. The United States  
17                   was represented by Assistant United States Attorney J. Tate London, and the defendant by  
18                   Mr. Barry L. Flegenheimer. The proceedings were recorded on cassette tape.

19                   The defendant had been convicted of the charges of Making, Uttering and Possession  
20                   of Counterfeit Securities. On October 29, 2004, he was sentenced by the Honorable Marsha  
21                   J. Pechman to a term of two hundred thirty-three (233) days in custody, followed by three (3)  
22                   years of supervised release.

23                   The conditions of supervised release included the requirement that the defendant  
24                   comply with all local, state, and federal laws, and with the standard conditions. Other special  
25                   conditions included that the defendant submit to mandatory drug testing pursuant to 18  
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01 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583; abstaining from the use of alcohol, and other  
02 intoxicants during the term of supervision; abstaining from new lines of credit without  
03 approval of the probation officer; having no identification other than in his legal true name;  
04 and restitution in the amount of \$45,000.

05 In an application dated July 28, 2005, Senior U.S. Probation Officer Jennifer J. Tien  
06 asserted the following violations of the conditions of supervised release:

07 (1) Using marijuana on or before July 13, 2005, in violation of the general  
08 condition that the defendant not use illegal substances.

09 (2) Failing to report for urinalysis testing on July 13, 18, and 26, 2005, as  
10 instructed via the drug code-a-phone, in violation of the special condition of drug aftercare.

11 (3) Failure to report to Community Corrections Center on July 27, 2005, in  
12 violation of the special condition that he reside in and participate in the CCC for up to 180  
13 days.

14 In an application dated February 14, 2006, Senior U.S. Probation Officer Jennifer J.  
15 Tien asserted the following supplemental violations against the defendant:

16 (4) Possession of a stolen firearm, in violation of RCW 9A.56.140 and in  
17 violation of the special condition and general condition that the defendant not possess a  
18 firearm, a destructive device, or any other dangerous weapon or commit any federal, state or  
19 local crimes.

20 (5) Possession of crack cocaine, in violation of the Uniformed Controlled  
21 Substances Act (VUCSA) and, in violation of the general condition that the defendant not  
22 commit any federal, state or local crimes and he not illegally possess a controlled substance.

23 (6) Possession of ecstacy, in violation of the Uniformed Controlled Substances  
24 Act (VUCSA) and, in violation of the general condition that the defendant not commit any  
25 federal, state or local crimes and he not illegally possess a controlled substance.

26 (7) Possession of suspected PCP, in violation of the Uniformed Controlled

01 Substances Act (VUCSA) and in violation of the general condition that the defendant not  
02 commit any federal, state or local crimes and he not illegally possess a controlled substance.

03 (8) Possession of Hydrocodone, in violation of the Uniformed Controlled  
04 Substances Act (VUCSA) and in violation of the general condition that the defendant not  
05 commit any federal, state or local crimes and he not illegally possess a controlled substance.

06 (9) Associating with a known felon, Devontre Jackson, without permission of the  
07 U.S. Probation Officer, in violation of the standard condition number 9.

08 At his initial appearance, the defendant denied the alleged violations, was advised of  
09 his rights, and an evidentiary hearing was scheduled for August 31, 2006. At the evidentiary  
10 hearing, the defendant was again advised of his rights to an evidentiary hearing. The  
11 government dismissed alleged violations 7, 8, and 9. The defendant admitted violations 1, 2,  
12 and 3, and waived any right to a hearing as to whether these violations occurred. An  
13 evidentiary hearing took place with respect to alleged violations 4, 5, and 6.

14 The government called Seattle Police Officers Brooks and Hammermaster and Seattle  
15 Police Detective Mooney as witnesses. The government subpoenaed Seattle Police Officer  
16 Nadel to appear, but he was unable to appear due to a birth in his family. The defendant  
17 testified on his own behalf and offered the declaration of Tanielle Jackson (Ex. 10), which  
18 was received into evidence. Ms. Jackson did not appear in person.

19 The following facts are undisputed. On February 1, 2006, the defendant was riding as  
20 a passenger in a 2000 Cadillac DeVille driven by Richard Davis. Around 10 p.m. the car was  
21 observed by SPD Officers Brooks and Hammermaster near the intersection of South Jackson  
22 and 23rd Avenue South in Seattle. The SPD Officers followed the car on 23rd Avenue  
23 South, determining that the car had exceeded the legal speed limit, was making weaving  
24 maneuvers without signal, and making improper turns. The DeVille turned right on to  
25 Massachusetts and stopped at a light at Rainier. Shortly after the light turned green, the  
26 officers turned on their lights and the DeVille stopped after turning on to 17th Avenue S.

01       Officer Brooks approached the driver's side of the DeVille, and Officer  
02 Hammermaster approached the passenger's side of the vehicle. When asked for his name,  
03 the defendant initially gave the name of his uncle, because he knew there was a warrant  
04 outstanding for his initial pretrial supervision violation. He subsequently advised Officer  
05 Hammermaster of his true identity and taken into custody. Richard Davis was also wanted  
06 on an outstanding warrant, so he, too, was taken into custody.

07       SPD Officers Brooks and Davis were joined by SPD Officer Nadel. A visual  
08 inspection of the DeVille, incident to the arrests, followed. The inspection revealed a pass-  
09 through compartment between the rear-passenger seat and the trunk of the vehicle, which  
10 pass-through was open. When shining a flashlight into the rear seat pass-through, a handgun  
11 and a bag were observed. The trunk was opened, and the handgun and bag were taken into  
12 evidence. Fingerprints were taken from the handgun. However, the prints that were lifted  
13 were not of sufficient quality to determine who had handled the handgun. No prints were  
14 taken or attempted to be taken from the bag.

15       Subsequent analysis indicated that the handgun was a Browning HiPower 9 caliber  
16 pistol that had been reported stolen from its owner in Oak Harbor, Washington. (Ex. 6).  
17 The bag was thought to contain rock cocaine, MDMA, PCP, and hydrocodone. After a lab  
18 analysis was completed, it was determined that the bag contained 4.8 grams of a substance  
19 containing cocaine, and thirty (30) pink tablets, weighing approximately 12.1 grams that  
20 were found to contain MDMA. The other tablets in the bag were not analyzed. (Ex. 9).

21       The driver was found to have money on his person. Mr. Davis did not have any  
22 money on his person. This matter was referred to the King County Prosecutor. Due to  
23 insufficient evidence, prosecution was declined.

24       The issue in this case, relating to alleged violations 4, 5, and 6, is whether Mr. Davis,  
25 as the passenger in the vehicle with no money on his person, can be found to have been in  
26 control or constructive possession of the handgun and the drugs found in the car. Both sides

01 have indicated that *U.S. v. Terry*, 911 F. 2d 272 (9th Cir. 1990) sets forth the controlling  
02 standard, the government by direct reference, and the defense by reference to the pattern  
03 instructions that are based on *Terry*. In *Terry*, the court held:

04 To prove constructive possession, the government must prove a  
05 “sufficient connection between the defendant and the contraband to support the  
06 inference that the defendant exercised dominion and control over the  
07 substance.” . . . It is not the same as merely knowing the weapon is nearby.  
08 “The circumstances of each case must be examined to determine if there is  
09 ‘such nexus or relationship between the defendant and the goods that it is  
10 reasonable to treat the extent of the defendant’s dominion and control as if it  
11 were actual possession.’ ”

12         *Id.* at 278, quoting *U.S. v. Cousins*, 427 F. 2d 382, 384 (9th Cir. 1970). In *Bettis v.*  
13 *U.S.*, 408 F.2d 563 (9th Cir. 1969), the Ninth Circuit reversed a finding of guilt which  
14 required a beyond a reasonable doubt standard basis when the evidence against the defendant  
15 consisted of nothing more than that the passenger was seated in the car when it was stopped,  
16 that he helped unload the contents of the trunk when Customs Officers requested him to do  
17 so, and that he gazed at some foil-wrapped packages. The court held that this might be  
18 sufficient evidence to make an arrest at the scene as a probable party to the importation, but  
19 would not be sufficient to convict him of being a party to possession. *Id.* at 567.

20         Although there are many agreed facts, there are critical factual disputes that relate  
21 directly to the issue of control. The DeVille permits the passenger seat to recline to an  
22 almost horizontal position. Officer Brooks and Hammermaster testified that when they  
23 initially approached the DeVille, they didn’t notice there was an passenger in the vehicle. It  
24 was not until they left their squad car and came close to the DeVille that they noticed that the  
25 defendant Harris was stretched out in a reclining position on the passenger seat. If this  
26 testimony is to be believed, then the clear inference is that Mr. Harris was attempting to place  
the bag and the gun into the trunk of the car, using the pass-through.

27         Mr. Harris denies that his seat was reclined. He testified that his seat was in a full-up  
28 position, and that he partially rolled down his window to speak with Officer Hammermaster

01 as he approached the vehicle. He also testified that he was unaware of the pass-through  
02 section to the trunk. He further testified that because he didn't trust the Seattle Police, he  
03 called a friend, Tanielle Jackson, who was the cousin of the driver when they noticed they  
04 were being followed by the SPD unit. They decided to drive to her house, and the DeVille  
05 came to a stop near her house. Ms. Jackson submitted a declaration that indicated that she  
06 did not see the car seat in other than an upright position. Ms. Jackson's declaration is not of  
07 much assistance on this point, however, because she was not present when the DeVille was  
08 stopped. She was driving to her house. The officers claimed that the defendant had already  
09 been placed in custody when she arrived. Ms. Jackson states in her declaration that "[w]hen I  
10 arrived at my residence Richard Davis had just pulled up in front of my residence. Richard  
11 was in the drivers seat and Carl Harris was in the passenger seat. There was a police car  
12 parked behind them with lights flashing. Two police officers were out of their cars."

13 Because this hearing is before the Court on a petition for violation of supervised  
14 release, the government is required to prove the violations utilizing a preponderance of the  
15 evidence standard. The Court believes that the government has sustained this burden with  
16 respect to the positioning of the seat. Because of this, the violations at issue are also proven.

17 No plausible reason was offered for the SPD Officers to have fabricated seeing the  
18 reclined seat on the passenger side. On the other hand, the defendant does have motivation  
19 for fabrication – to avoid prosecution on this matter. Moreover, the admitted facts are  
20 consistent with the seat being reclined. The defendant knew a warrant was outstanding  
21 against him. If caught with the drugs and the handgun, he was certainly aware that this  
22 would cause a problem. He testified that he was aware that he was being followed by a  
23 police squad car, and called Ms. Jackson as a result. Because he was being followed, there  
24 was no opportunity to dispose of the illegal substances. The pass-through to the trunk of the  
25 DeVille was open, rather than being in a closed position, indicative of haste in trying to  
26 conceal contraband. Mr. Harris testified that Ms. Jackson was already at the house when they

01 stopped, to try to bolster the credibility of her declaration. However, as noted above, she  
02 acknowledged driving up to the house after the officers were already out of their squad car.

03 Seriously conflicting stories regarding whether the passenger seat was up or reclined  
04 have been made in this case. Utilizing a preponderance of the evidence standard, I find that  
05 the government has satisfied its burden, and recommend that the Court find the defendant to  
06 have violated his supervised release as alleged in violations numbers 4, 5, and 6. Based on  
07 his admissions, I also recommend that the Court find the defendant to have violated his  
08 supervised release as alleged in violations numbers 1, 2, and 3. As discussed above, alleged  
09 violations numbers 7, 8, and 9 have been dismissed.

10 A disposition hearing has not yet been scheduled before the Honorable Marsha J.  
11 Pechman. Pending a final determination by the Court, defendant has been detained.

12 DATED this 1st day of September, 2006.

13   
14 JAMES P. DONOHUE  
15 United States Magistrate Judge

19 cc: District Judge: Honorable Marsha J. Pechman  
20 ASA: Mr. J. Tate London  
21 Defendant's attorney: Mr. Barrie L. Flegenheimer  
Probation officer: Ms. Jennifer J. Tien